

CITATION: Hardwick v. Blue Buffalo Company, Ltd. et al., 2021 ONSC 5297
COURT FILE NO.: 16-67441
DATE: 2021/08/04

SUPERIOR COURT OF JUSTICE – ONTARIO
Proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6 as amended

RE: Brian Hardwick, Plaintiff

AND:

Blue Buffalo Company, Ltd. and Blue Buffalo Pet Products, Inc., Defendants

BEFORE: Regional Senior Justice C. MacLeod

COUNSEL: Jeff Orenstein and Andrea Grass, for the Plaintiff

Scott Maidment and Jennifer Dent, for the Defendants

HEARD: July 29, 2021

ENDORSEMENT

[1] This class proceeding was certified for settlement purposes on April 15, 2021. (See 2021 ONSC 2820). The hearing today was to approve the settlement, the plan for final administration, and also to consider the proposed counsel fees.

[2] In accordance with the publication and advertising schedule, notice was given in a manner designed to come to the attention of all members of the class. Class members were given deadlines to register, to opt out and to file objections. As of the date of the hearing, almost 4,000 individuals had registered with Class Counsel, no one had opted out and no objections were received.

[3] The allegation against the defendant mirrored allegations made in the United States. It was alleged that during a certain period of time prior to 2016, due to what are now identified to have been supply chain issues, not all ingredients in all product lines were always the premium ingredients identified on the packaging. The harm alleged was not that any of the products were harmful or that any pets suffered adverse effects, but simply that not all consumers received the premium product they may have paid extra for.

[4] In these circumstances, it would have been an insurmountable task for individual consumers to have proven that they purchased a particular product during the period in question, what they paid for that product, whether the particular batch of product was defective and whether or not there was any harm suffered beyond paying a premium price for a product that may not have been precisely as advertised.

[5] It is for this reason that the parties agreed upon a claims process which involved self identification as a class member, a window of time to register, a cut off date and a fixed relatively nominal amount of compensation for each registered member of the class. While the damages are nominal in absolute terms, the result is close to a full refund for the cost of two bags of premium pet food for each of the listed class members.

[6] The second component of the settlement involved a *cy-près* payment equivalent to the total of the compensation to the listed class members. This amount of \$375,968.00 will be donated to two identified schools of veterinary medicine and the Toronto Humane Society. This is designed to provide an indirect benefit to members of the class who did not register and will not be receiving individual payments.

[7] In addition to the individual monetary payments and the *cy-près* payments, the defendants have agreed to pay the costs of administering the settlement, a counsel fee and an honorarium to the named class plaintiff. These amounts are in addition to the payments being made for the benefit of the class itself.

[8] The plaintiff had also sought injunctive relief. In respect to that aspect of the claim, the defendant has certified that all specifications for Blue Buffalo Pet Food Products have now been reviewed to ensure they are consistent with the claims for the products shown on packaging and on the defendant's website. The defendant has also reviewed its supplier relationships to ensure that all materials supplied by those suppliers comply with the applicable product specifications.

[9] In exchange for this settlement, the defendant seeks a discontinuance of the proceeding, a release and a bar to any member of the class or anyone claiming through a member of the class to continue or commence a proceeding dealing with the same set of facts.

[10] In reviewing and approving this settlement, I have been referred to findings made in the United States District Court for the Eastern District of Missouri when approving settlement of similar MDL class proceedings in that country. It is worth observing that in the U.S., the proceedings were contested and were the subject of an appeal. The U.S. Court of Appeals for the 8th circuit conducted its own fairness assessment and upheld the settlement approved by the District Court. Those decisions form part of the motion materials. Those findings and the approval of the U.S. class proceedings is not binding on this court, but the court may have regard to those proceedings and be informed by the outcome.

[11] The proposed Canadian settlement has differences from the settlement in the United States. Of course, the class size and the total amount of the payments are smaller, but in addition, under the Canadian settlement, compensation is available to the listed class members without production of a receipt and there is a *cy-près* payment which provides an indirect benefit to identified and unidentified members of the class. In addition, the Canadian settlement provides for efficiencies. Besides avoiding a contested hearing, the parties have agreed to have class counsel carry out the role of claims administrator. Given the streamlined process of making claims which has already been completed and the agreement to fund the costs of administration in addition to the payments

to the class, the avoidance of the cost of an additional claims administrator is both appropriate and a component part of the settlement.

[12] Consent of the parties, notice to class members, and absence of opposition to the settlement are not in and of themselves sufficient ground for approving a settlement, but they are important considerations. The court must still conduct an analysis at the time of the fairness hearing, as it was obliged to do at the time of certification to ensure that the settlement is appropriate and in compliance with the requirements and objectives of the Act.

[13] A proposed settlement will be reviewed to ensure that it is fair not only to the members of the class who will receive benefits directly, but also to the class members whose rights (if any) will be foreclosed by the proposed release and litigation bar. While this is a factor that is peculiar to class action litigation, a class action settlement also engages the considerations of any settlement. That is the court must consider the benefits of settlement compared to the potential recovery if the settlement is rejected and the parties are required to continue with the litigation.

[14] Section 27.1 of the Act which came into force in late 2020 does not technically apply to this action pursuant to the transition provisions in s. 39. Counsel, however, have approached the matter as if those factors set out in the new legislation do apply and submits, correctly in my view, that the statutory provisions regarding settlement approval by and large codify the pre-existing case law.

[15] I am satisfied that the proposed settlement is fair to the class members and that it reflects a reasonable outcome. There is no evidence of collusion between the parties to the detriment of the class members. To the contrary, the recovery to the listed members of the class is undoubtedly superior to what they might have achieved had they launched individual small claims court actions and the *cy-près* benefit to organizations that support the well being of pets is a significant indirect benefit.

[16] I am also prepared to approve the administration fees, counsel fees and the honorarium. In this case the parties adopted the exemplary procedure of negotiating the settlement independent of the question of costs. Had they been unable to agree on the costs and fees, they would have asked the court to deal with that, but in any event part of the settlement includes the fact that counsel fees and costs would be paid in addition to the settlement. Accordingly, the proposed amounts are not coming out of the component of the settlement to be paid to or for the benefit of the class.

[17] With respect to the counsel fees, class counsel is requesting approval of the agreed upon sum of \$295,000 plus HST. This is only slightly more than the value of the docketed time spent on the file without the application of a multiplier. It is significantly less than the amount that would be generated by either application of a multiplier or enforcement of the contingency fee agreement originally signed with the plaintiff. As noted above, this is a negotiated payment of costs to be paid directly by the defendant and will not come out of the settlement itself. Class counsel is thereby waiving any entitlement to contingency fees under the retainer agreement. Nothing will be paid by the representative plaintiff or by members of the class.

[18] Similarly, the parties have negotiated payment of an honorarium to the representative plaintiff. This is in the amount of \$5,000 as some compensation for the time devoted to acting in this capacity and the risk assumed in putting himself forward as a plaintiff for the benefit of the class.

[19] As I have observed on previous occasions, the purposes of the *Class Proceedings Act* do not include creation of professional plaintiffs and there has been some controversy over the question of honoraria. (See *Forbes v. Toyota*, 2018 ONSC 5369). A modest payment of \$5,000 which the defendant has agreed to fund is unlikely to suggest that acting as a representative plaintiff is a lucrative pursuit but is some reward for the time and risk.

[20] In conclusion I am approving the settlement, the fees and honorarium as proposed and as fully detailed in the formal order. I have added a paragraph to the draft order requiring the Claims Administrator to report to the court once the settlement funds have been distributed. Although in future this will be a statutory requirement, prior to the amendments a report was frequently required as a term of approving the settlement. It is generally my practice to do so.

[21] I commend the parties and counsel for the well organized and efficient manner in which this case has been handled.

A handwritten signature in blue ink, appearing to read "C. MacLeod R55", is written above a horizontal line.

Regional Senior Justice C. MacLeod

Date: August 4, 2021

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ENDORSEMENT

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Released: August 4, 2021